Supreme Court, U.S.
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No.

Supreme Court of the United States

LEA SCOTT FULLWOOD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LEA SCOTT FULLWOOD
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55 pp

QUESTION PRESENTED

1.) Whether, as the Courts of Appeals for the District of Columbia, the Second, Third, and Sixth Circuits have held, in conflict with the decision below and decisions of the First, Seventh, Eighth, and Ninth Circuits, the term "otherwise extensive" contained in U.S.S.G. § 3B1.1, the Federal Sentencing Guideline governing enhancement for "role in the offense", is limited to a defined 'head count' or can include consideration of additional factors potentially implicating "double counting"?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit.

More specifically, the Petitioner Lea Scott Fullwood and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Lea Scott Fullwood, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on 8-8-03.

OPINIONS BELOW

The 8-8-03 opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is reported at 342 F.3d 409; 2003 U.S. App. LEXIS 16309, and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Northern District Of Texas, entered on 7-12-02, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 8-8-03. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

U.S.S.G. § 3B1.1.

(See Appendix C for text)

STATEMENT OF THE CASE

Petitioner Lea Scott Fullwood was a substantial and highly respected farmer for approximately 20 years in Nolan County, Texas, who participated in farm assistance programs administered by the federal Farm Service Agency (FSA). *United States v. Fullwood,* 342 F.3d 409; 2003 U.S. App. LEXIS 16309 **1-2 (5th Cir. 8-8-03); (Transcript 1082)[1]

On 12-12-01, Mr. Fullwood was charged together with his father in law, Ozy Thomas Stewman, Jr., in an indictment with multiple violations of 18 U.S.C. § 371 (Conspiracy); 18 U.S.C. § 287 (False Claims); 18 U.S.C. § 1341 (Mail Fraud); 18 U.S.C. § 1001 (False Statements). The gravamen of the charges was that he had collected crop insurance payments on land that he had not planted.[2]

He was subsequently charged in two superseding indictments. In the Second Superseding Indictment filed 2-12-02, the indictment upon which Mr. Fullwood proceeded to trial, the government added charges of violation of 18 U.S.C. § 1956 (Money Laundering); 18 U.S.C. § 2 (Aiding & Abetting); and 18 U.S.C. § 982 (Forfeiture). The government

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[1] This refers to page 1082 of the consecutively paginated transcript of the trial in this case which started on 3-18-02 and was concluded on 4-11-02.

[2] To receive FSA crop disaster payments, Mr. Fullwood had to certify to the Nolan County FSA office each of the crops planted on his farms. He was also entitled to purchase, through independent crop insurance agents, multiple peril crop insurance reinsured by the Government. (The private insurers are reimbursed by the Federal Crop Insurance Corporation (FCIC) (managed by the Risk Management Agency (RMA)) for certain claims they pay to insured producers based on crop losses, as well as for portions of the producers' premiums, which are subsidized by the Government.) *United States v. Fullwood,* 342 F.3d 409; 2003 U.S. App. LEXIS 16309 ** 1-2 (5th Cir. 8-8-03).

also modified their theory of the case by the addition of an "alternative pleading". In this charge, the government through the grand jury pleaded:

> "By way of alternative pleading and in response to Defendant's prior assertions to law enforcement, the Grand Jury alleges that even if Defendants placed cotton and grain sorghum seed on the fields in question, Defendants defrauded and intended to defraud those victims and farm programs outlined above by placing the seed on the fields intending for such crops to fail and in a manner which manifest this intent that the crops fail."

(Second Superseding Indictment, page 6, ¶12.1; page 13, ¶26.1; page 35, ¶60.1)

Mr. Fullwood proceeded to trial. At trial, the government's theory of the case was that a corrupt insurance adjuster, one Darren Jeffrey, had been paid a 5% kickback to appraise losses for various farmers on certain fields for the purpose of obtaining insurance payments. There was no evidence or even allegation that Mr. Fullwood had conspired or 'schemed' with the other farmers. Mr. Jeffrey had allegedly approached Mr. Fullwood during the course of appraising his crop losses. Mr. Fullwood had not approached Mr. Jeffrey.

In fact, false appraisals by Mr. Jeffrey had come to the attention of law enforcement and, as part of his attempt to curry favor, he started advising the government as to numerous farmers for whom he'd allegedly done false appraisals. The government had expressed an interest in Mr. Fullwood and certain other farmers to Mr. Jeffrey who then advised the government that Mr. Fullwood was a farmer for whom he'd done both legitimate and false appraisals. In the beginning, Mr. Jeffrey only advised the government he'd done false appraisals and did not advise that he'd received kickbacks. When the government became aware that Mr.

Jeffrey had been receiving kickbacks, the government decided not to file any "substantial assistance" or "Rule 35" motion on behalf of Mr. Jeffrey. The government also moved for enhancement of his sentence for obstruction of justice. At the time of trial, Mr. Jeffrey was trying desperately to make as big of a case as possible to obtain any benefit he could still obtain from the government. (Transcript 767-870)

The government presented various witnesses and circumstantial evidence that Mr. Fullwood hadn't planted certain crops on certain fields at certain times. Included in the evidence, were some hotly contested satellite photos and expert testimony as to the significance of the photos. On cross examination, the witness admitted that the photos were not inconsistent with a failed wheat crop instead of a failure to plant the crop. (Transcript 901-964) Notably, there was no evidence that Mr. Fullwood had ever paid Mr. Jeffrey a 5% kickback for the alleged appraisals. While Mr. Fullwood's bank account showed some relatively small cash withdrawals and/or checks made out to cash, these were insufficient to account for the alleged 5% payment and, in any event, the withdrawals postdated the appraisals by a significant time period. (Transcript 889-897)

Mr. Fullwood took the witness stand and testified in his own defense. Mr. Fullwood denied any agreement with Mr. Jeffery to commit fraud (Transcript 1422-1425). Mr. Fullwood testified that he never paid Jeffrey any kick-backs (Transcript 1424). Mr. Fullwood's testimony explained how he planted fields and, when they failed, he properly and legally planted them again to another crop.[3] Unfortunately,

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[3] To an individual not familiar with farming in Texas, it may seem strange to plant a crop when dry weather makes it highly unlikely the crop will be successful. If a Texas farmer waited, however, until he had good odds for a crop before planting, he wouldn't plant very many crops. The nature of the insurance agreement is, however, that the company assumes the risk in exchange for a substantial premium paid

but indisputably, the year 1999 had numerous natural problems for agriculture in his area of Texas and, consequently, the successive crops also failed.

In addition to Mr. Fullwood, the defense presented other evidence and a large number of witnesses who testified to *personal knowledge* that the fields had, in fact, been planted but that the crops had, in fact, failed as many if not most crops did that year in that part of Texas. (Transcript 1099-1527)

The case went to the jury and, on 4-11-02, the jury found Mr. Fullwood not guilty as to Counts 1, 10-11, 17-18, 26-27, 35-36, 44-45, 47-57. Mr. Fullwood was found not guilty as to Counts 2-9, 12-16, 19-25, 28-34, 37-43, and 46. (Appendix B)

Mr. Fullwood's codefendant (and father in law) was found not guilty as to all counts in which he had been charged.

When the Presentence Report was prepared, the report recommended 4 levels enhancement under U.S.S.G. § 3C1.1 for obstruction of justice based on Mr. Fullwood's testimony at trial. The report also recommended 2 points enhancement of his sentence under U.S.S.G. § 3B1.1 for role in the offense as follows:

> Adjustment for Role in the Offense: Evidence presented at trial reflected the defendant was an *organizer and manager* in criminal activity that was otherwise extensive *as evidenced by the number of claims made and individuals involved.* Evidence revealed defendant introduced both his codefendant, Ozzy Thomas Stewman, Jr., and his father, Eugene Fullwood, to Darrell Jeffrey, advising them of the scheme which was to be enacted

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by the farmer. There is no requirement, legally or morally, that the farmer help the insurance company by only buying insurance when there's a good chance he won't need it.

> by Jeffrey in order to defraud the U.S. Department of Agriculture. As a result, numerous individuals became unknowingly involved in the instant offense, as well as *numerous false claims and mailings were made*. This activity meets the criteria set forth in U.S.S.G. § 3B1.1(a) and, therefore, an increase in the base offense level by 2 points is applicable.

(Presentence Report, page 12, ¶36) (emphasis added)

Objections were filed to the Presentence Report. In the objections, counsel stated, *inter alia*:

> ... Defendant objects to the adjustment for role in the offense as set forth in paragraph 36. The PSR does not allege facts sufficient to justify this adjustment The allegation that the activity was extensive does not translate into an allegation that Defendant managed or supervised any participant (a term of art) ...
>
> The 2 level adjustment is not appropriate for 3B1.1(a) in any event by the express terms of the adjustment.
>
> The evidence at trial did not show that Defendant managed or supervised any other participant 3B1.1 n2.

(Objections to Presentence Report)

In responding to the objections, the Probation Officer noticed that he had made a "typographical error"[4] with respect to the recommendation for the 2 points enhancement for role in the offense, but then rejected the objection with the following statement:

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[4] In responding to the objections, the Probation Officer also acknowledged that he'd made another typographical error when he recommended 4 points enhancement under U.S.S.G. § 3C1.1 for obstruction of justice. Two (2) points are the maximum allowed. *Id.*

The defendant's objection has revealed a typographical error in paragraph 36. U.S.S.G. § 3B.l(a) provides for a 4 point increase in the base offense level rather than a 2 point increase as indicated in the Presentence Report. During the course of the instant offense, the defendant specifically involved his father-in-law, Ozzie Thomas Stewman, Jr., codefendant, in the instant offense through his introductions to Darrell Jeffrey. The defendant also introduced Jeffrey to his father. The defendant drove Jeffrey to each of his farms that were falsely appraised and adjusted. Further, to execute the scheme, Fullwood and Stewman executed a "cash lease agreement" between themselves and then late certified that Fullwood had planted cotton and grain sorghum on FSN 570 and 576 in January 2000 when, in fact, they had not. All of these actions, along with Jeffrey's false appraisals and the defendant's claims revealed an extensive scheme to defraud the U.S. Department of Agriculture. Application Note 3 of U.S.S.G. § 3B1.1 provides that the Court "in assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders, could be considered extensive. Thus, as the defendant used the unknowing services of many outsiders, including employees of the Farm Services Agency, Hargrove Insurance Company, and the U.S. Postal Service to execute and deliver all of his fraudulent documents, this officer believes a 4 point

> increase in the base offense level pursuant to U.S.S.G. § 3B1.1(a) is correct. Therefore, paragraph 36 should be corrected to show an increase in the base offense level by 4 points.

(Presentence Report, Addendum)

At sentencing, counsel renewed his objection to the enhancement for role in the offense arguing:

> MR. HOLDER: The objection to the 4-point adjustment upward for organizer or leader. Your Honor, the evidence at trial did not show that Mr. Fullwood supervised any criminal participant. Note 2 of the 3B1.1 requires that to qualify for administration of this adjustment, the actor must supervise at least one participant. That's a term of art. It means someone who's guilty of criminal action. *It does not mean the unknowing participation of someone who handles a letter or someone who handles a document in the Farm Service Agency. Under the government theory, anyone who defrauded the government and used the mails to do it would be an organizer or leader.*

(Transcript, Sentencing, 7-12-02, pages 2-3) (emphasis added).

The District Court overruled this objection as follows:

> As to the defendant's objection to paragraph 36 concerning the defendant's role in the offense, the court will overrule that objection. The court finds that the defendant did *manage or supervise*[5] others in regard to

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[5] It is unclear how the District Court imposed 4 points enhancement under U.S.S.G. § 3B1.1(a) with a finding that Mr. Fullwood did "***manage or supervise***" others. The operative language in Section 3B1.1(a) which authorizes a 4 points enhancement is if the defendant "was an ***organizer or***

> this commission of this offense, particularly in regard to his father-in-law, Mr. Stewman; his father, Eugene Fullwood; and also as to the adjuster, Darrell Jeffrey. As to the defendant's objections to paragraphs 28 and 37 of the presentence report, the court will overrule those objections...
>
> The court then will adopt as the court's findings those matters set forth in the presentence report, as amended by the addendum and as amended by the court's ruling this morning, not only as it relates to the background data and information, but also the analysis made under the sentencing guidelines...

(Transcript, Sentencing, 7-12-02, pages 8-10)

Mr. Fullwood was sentenced to serve 41 months incarceration plus 3 years supervised release, $234,656.00 restitution, and $2,200.00 special assessment. The sentence of incarceration represented 4 points enhancement for role in the offense under U.S.S.G. § 3B1.1(a) and the bottom end of the guideline sentencing range found applicable by the District Court.

But for the role in the offense enhancement, Mr. Fullwood could have been sentenced as low as 27 months.

On direct appeal, counsel renewed his argument that the Mr. Fullwood had received an unlawful enhancement under U.S.S.G. § 3B1.1 for role in the offense. Counsel specifically argued that even in the light most favorable to the government, there was no evidence that Mr. Fullwood supervised any criminally responsible parties. Counsel also

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leader of a criminal activity". The *manage or supervise* language is used in Sections 3B1.1(b) and (c) which authorize lesser enhancements of 3 points and 2 points respectively.

argued that it was improper to apply the enhancement under the "otherwise extensive" language of the guideline.

On 8-8-03, the Court of Appeals denied Mr. Fullwood's appeal and affirmed the enhancement under U.S.S.G. § 3B1.1(a) with the following holding:

> Finally, Fullwood challenges the four-point enhancement he received, pursuant to U.S.S.G. § 3B1.1, for being an organizer or leader of the criminal activity. The presentence investigation report (PSR) recommended the enhancement on the basis that Fullwood was an organizer or manager in a criminal activity that, consistent with the language of § 3B1.1, was otherwise extensive. Over Fullwood's objection, the district court imposed the enhancement, finding Fullwood "did manage or supervise others in regard to this commission of this offense, particularly in regard to his father-in-law[,] his father[,] and also as to the adjustor...."
>
> The pertinent portion of § 3B1.1 states:
>
> > Based on the Defendant's role in the offense, increase the offense levels as follows:
> >
> > (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants *or was otherwise extensive*, increase by 4 levels.
>
> (Emphasis added.)
>
> > In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be

> considered. Thus, a fraud that involved only three [**14] participants but used the unknowing services [*415] of many outsiders could be considered extensive.

U.S.S.G. § 3B1.1, cmt. n.3 (emphasis added). Fullwood claims the enhancement was improper because his criminal activity did not involve the requisite five participants and was not "otherwise extensive".

* * * * * * * * * *

The Government does not contend the offense involved five or more persons. Instead, as recommended by the PSR, it maintains the enhancement is justified because Fullwood was the leader or organizer of criminal activity that "was otherwise extensive". Along this line, the Government points to the involvement of Jeffrey (the appraiser), Fullwood's father and father-in-law, and the following unwitting [**15] participants: USDA; RMA; FCIC; FSA; FSA, Nolan County Office; Rayford Hargrove (insurance agent); Hargrove Insurance Company; Fireman's Fund Insurance Company; the United States Postal Service; and private interstate carriers.

In the light of the use of these unknowing participants, the "otherwise extensive" application was not clearly erroneous. *United States v. Davis*, 226 F.3d 346, 360 (5th Cir. 2000), cert. denied, 531 U.S. 1181, 148 L. Ed. 2d 1021, 121 S. Ct. 1161 (2001), held that applying the § 3B1.1(a) enhancement was not clearly erroneous because of the involvement of unwitting

accomplices where the defendant operated "an advance-fee scheme in which he would agree to obtain funding for clients, but would never do so". *Id.* at 348-49. There, the scheme involved employees of a financial company, loan brokers, lawyers, and those providing "due diligence" reports. *Id.* See also *United States v. Sidhu*, 130 F.3d 644 (5th Cir. 1997) (§ 3B1.1 applied to physician involved in health care fraud where patients and insurance company's employees were unknowing participants); *United States v. Allibhai*, 939 F.2d 244, 253 (5th Cir. 1991), [**16] *cert. denied*, 502 U.S. 1072, 117 L. Ed. 2d 133, 112 S. Ct. 967 (1992) (§ 3B1.1 applied to scheme involving only four participants that used services of outsiders such as bank employees). The use of unsuspecting participants was similarly extensive here. Application of the enhancement on that basis was not clearly erroneous.

Fullwood also maintains, quite conclusionally, that his role was not one of leader or organizer. The factors to be considered are: (1) exercise of decision-making authority; (2) nature of participation in the commission of the offense; (3) recruitment of accomplices; (4) claimed right to a larger share of the fruits of the crime; (5) degree of participation in planning or organizing; (6) nature and scope of the illegal activity; and (7) degree of control or authority exercised over others. U.S.S.G. § 3B1.1, cmt. n.4.

Fullwood: chose which false claims to submit; prepared, signed, and submitted those claims; introduced Jeffrey to his father and father-in-law, presumably to bring them in on

> the scheme; took 95 percent of the profits (all but the five percent kickback); and, as stated, utilized the services of countless outsiders. Finding him [**17] to be a leader or organizer was not clearly erroneous.
>
> *We caution, however, that this case arguably comes close to the lower limits, for § 3B1.1 purposes*, for what constitutes an organizer or leader of criminal activity that [*416] was otherwise extensive. The enhancement is designed to assign greater punishment to those engaged in leading criminal enterprises, in part because of concerns about relative responsibility. See U.S.S.G. § 3B1.1 cmt. It is to be imposed against defendants who tend to profit more from criminal enterprises, pose a greater danger to the public, and are more likely to recidivate. *Id.* Obviously, it is not a plea bargaining tool; likewise, it is not to be applied automatically.

United States v. Fullwood, 342 F.3d 409; 2003 U.S. App. LEXIS 16309 ** 13-17 (5th Cir. 8-8-03) (Appendix A)

Mr. Fullwood demonstrates within that this Court should grant his Petition For Writ Of Certiorari to resolve a conflict among the United States courts of appeals the meaning of the term "otherwise extensive" as used in Federal Sentencing Guideline Section 3B1.1 to determine "role in the offense" enhancement.

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT MR. FULLWOOD'S PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO THE MEANING OF THE TERM "OTHERWISE EXTENSIVE" AS USED IN FEDERAL SENTENCING GUIDELINE SECTION 3B1.1 TO DETERMINE "ROLE IN THE OFFENSE" ENHANCEMENT.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> ***CONSIDERATIONS GOVERNING***
> **REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial

> proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

1A.) The Federal Circuits Are Divided As To Whether The Term "Otherwise Extensive", Contained In Federal Sentencing Guideline Section 3B1.1 Governing Enhancements For "Role In The Offense", Is Limited To A Defined 'Head Count' Or Can Include Consideration Of Additional Factors Potentially Implicating, For Example, Double Counting.

In *United States v. Wilson*, 345 U.S. App. D.C. 115; 240 F.3d 39; 2001 U.S. App. LEXIS 2639 (DC Cir. 2001), the defendant challenged an upward adjustment in her sentence under U.S.S.G. § 3B1.1(a) for role in the offense, arguing, *inter alia*, that the offense was not "otherwise extensive" within the meaning of the guideline. The Court of Appeals agreed and vacated her sentence while observing that the circuits are currently split on the factors relevant to an activity's being "otherwise extensive."

The Court of Appeals pointed out that the Third Circuit had recently adopted the test followed by the Second Circuit which holds that the court must look primarily or solely to the number of persons involved in the criminal activity, criminally or noncriminally. *Wilson*, 240 F.3d 39, at 47; 2001 U.S. App. LEXIS 2639 at *17 (citing *United States v. Carrozzella*, 105 F.3d 796, 802 (2nd Cir. 1997) and *United States v. Helbling*, 209 F.3d 226, 244-45 (3rd Cir. 2000)).

By contrast, the Court of Appeals noted that the Fifth, Seventh, Ninth and Tenth Circuits follow the First Circuit

which requires only one other criminally responsible person and, once this is met, directs the court to "plunge into an unconstrained inquiry into the scale of the activity" under a totality of the circumstances" test examining "not only the number of participants but also the width, breadth, scope, complexity, and duration of the scheme". *Wilson*, 240 F.3d 39, at 47; 2001 U.S. App. LEXIS 2639 at *17 (citing *United States v. Dietz*, 950 F.2d 50, 53 (1st Cir. 1991) and *United States v. Mergerson*, 4 F.3d 337, 348 (5th Cir. 1993) and *United States v. Tai*, 41 F.3d 1170, 1174-75 (7th Cir. 1994) and *United States v. Rose*, 20 F.3d 367, 374 (9th Cir. 1994) and *United States v. Yarnell*, 129 F.3d 1127, 1139 (10th Cir. 1997)

After careful analysis, in a divided opinion, the Court of Appeals for the District of Columbia adopted the reasoning of the Second and Third Circuits and rejected that of the First, Fifth, Seventh, Ninth, and Tenth Circuits.

The division in the circuits has also been noted by the Sixth Circuit in *United States v. Anthony*, 280 F.3d 694; 2002 U.S. App. LEXIS 2213 (6th Cir. 2002), where the Court of Appeals also adopted the reasoning of the District of Columbia, the Second and the Third Circuits and specifically rejected the approach of the First Circuit. The Sixth Circuit held that the phrase "otherwise extensive" only authorizes a four-level enhancement "when the combination of knowing participants and non-participants in the offense is the functional equivalent of an activity involving five criminally responsible participants". While the Court agreed that non-participants can be counted under certain circumstances, the Court of Appeals observed

> The difficult task is counting non-participants in a way that ensures an activity is not identified as "otherwise extensive" as [**15] a result of counting persons who were only tangentially involved in the offense. "The purpose of the provision would rarely be achieved by counting the unknowing services

of some actors in a criminal scenario, a taxicab driver or bank teller, for instance." *Helbling*, 209 F.3d at 247. Much of the work has already [***10] been done for us by the Second Circuit in *Carrozzella* and the courts that agree with its analysis of "otherwise extensive." n1 The purpose of the *Carrozzella* test is to enable a court to identify an individual whose contribution was so essential to the criminal objective [*701] that he should be counted as a "participant" under § 3B1.1(a) irrespective of his true criminal intent. To this end, *Carrozzella* announced a three-factor test that examines:

> (i) the number of knowing participants;
>
> (ii) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent; and
>
> (iii) the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme.

Carrozzella, 105 F.3d at 804. After the sentencing [**16] court determines the number of non-participants who should be counted in light of factors (ii) and (iii), the court must consider whether the combination of knowing participants and countable non-participants is the functional equivalent of an activity carried out by five criminally responsible participants. The Second Circuit noted that this requires more than a simple summation of participants and non-participants because "the use of knowing participants to carry out a criminal activity

> may be more inefficient than the use of knowing participants." *Id.* As a result, in addition to the number of countable non-participants, the test for functional equivalence requires that a sentencing court consider how significant the role and performance of an unwitting participant was to the ultimate criminal objective. See *id.*

United States v. Anthony, 280 F.3d 694, 701; 2002 U.S. App. LEXIS 2213 ** 15-16 (6th Cir. 2002)

The Third Circuit has also detailed the division in the Circuits in its published decision in *United States v. Helbling*, 209 F.3d 226, 244-45 (3rd Cir. 2000), when it adopted the reasoning of the Second Circuit decision in *United States v. Carrozzella*, 105 F.3d 796, 802 (2nd Cir. 1997) and rejected that of the circuits, including the First, Fifth, Eighth, and Tenth Circuits that examine characteristics of the criminal activity beyond the 'head count' to determine whether the upward adjustment under the "otherwise extensive" language applies.

As set forth in the Statement of the Case, supra, the Court of Appeals for the Fifth Circuit affirmed the District Court decision holding that the enhancement applied in Mr. Fullwood's case based on the both the characteristics of the alleged scheme and on the so-called participation of clerks in the postal service and Department of Agriculture. (Statement of the Case) (See Appendix A)

This decision by the Fifth Circuit directly conflicts with the decisions of the District of Columbia, Second, Third, and Sixth Circuits in the cases set forth above.

The split in the circuits is clear cut and the opposing positions are hardening instead of harmonizing.

This Court has never resolved this question which divides the Courts of Appeals and, as is apparent from the numerous published decisions, the unsettled question is a constantly recurring one which has created much uncertainty in the courts below. The outcome of litigation should not

depend on the location of the court in which it occurs. These facts strongly militate for grant of certiorari. See Supreme Court Rule 10(a).

1B.) But For The Distinct And Controversial Method Of Enhancing Mr. Fullwood's Sentence Under Guideline Section 3B1.1, There Is A Reasonable Probability He Would Have Received A Substantially Reduced Sentence.

As set forth in the preceding argument and in the Statement of the Case, Mr. Fullwood received a 4 points enhancement to his sentence under U.S.S.G. § 3B1.1(a) for role in the offense based in part on "numerous individuals" who "became unknowingly involved in the instant offense", as well as the fact that "*numerous false claims and mailings were made.*" (Presentence Report, page 12, ¶36) (emphasis added).

The Court of Appeals affirmed the enhancement based in part on,

> ... the following unwitting participants: USDA; RMA; FCIC; FSA; FSA, Nolan County Office; Rayford Hargrove (insurance agent); Hargrove Insurance Company; Fireman's Fund Insurance Company; the United States Postal Service; and private interstate carriers.

United States v. Fullwood, 342 F.3d 409; 2003 U.S. App. LEXIS 16309 ** 15 (5th Cir. 8-8-03).

Had Mr. Fullwood been sentenced in the District of Columbia, Second, Third, or Sixth Circuit, the court would not have considered whether "numerous false claims and mailings were made" in determining whether the enhancement applied. Moreover, in these circuits, the simple fact that "unwitting participants" such as clerks, the Postal

Service, and private interstate carriers were involved, would not, standing alone, have been enough for the enhancement.[6] Had Mr. Fullwood been sentenced in these circuits, there is a reasonable probability that he would have received a substantially reduced sentence.

It bears repeating, the outcome of litigation should not depend on the location of the court in which it occurs. Supreme Court Rule 10(a)

Additionally, this case presents an opportunity for this Court to resolve this unsettled question in a case which can be broadly applied in the courts below. Every violation of 18 U.S.C. § 1341 involves the Postal Service and, under the reasoning of the Fifth Circuit virtually guarantees the enhancement. This is a further and important consideration which strongly militates for grant of certiorari. *Vasquez v. United States,* 454 U.S. 975, 70 L.Ed.2d 396, 102 S.Ct. 528 (1981).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Fifth Circuit in Mr. Fullwood's case.

---

[6] If the courts can follow the Fifth Circuit and routinely count clerks and the Postal Service, mail fraud cases will acquire a per se enhancement for role in the offense. This is something the Sentencing Commission could not have intended.

CONCLUSION

For all of the foregoing reasons, Petitioner Lea Scott Fullwood respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

LEA SCOTT FULLWOOD
% Lisa Fullwood
518 County Road 151
Roscoe, TX 79545

Date: 11-6-03 .

No.

Supreme Court of the United States

LEA SCOTT FULLWOOD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

COMES NOW PETITIONER Lea Scott Fullwood and submits the attached appendix pursuant to Supreme Court Rules.

LEA SCOTT FULLWOOD
% Lisa Fullwood
518 County Road 151
Roscoe, TX 79545

Date:_____

APPENDIX A

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED 8-8-03

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
LEA SCOTT FULLWOOD,
Defendant-Appellant.
No. 02-10840
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
342 F.3d 409; 2003 U.S. App. LEXIS 16309
August 8, 2003, Filed
PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Texas. 1:01-CR-80-1. Sam R Cummings, US District Judge.
DISPOSITION: Affirmed.
CASE SUMMARY

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Marc W Barta, US Attorney's Office, Dallas, TX.

For LEA SCOTT FULLWOOD, Defendant - Appellant: Richard A Anderson, Burleson, Pate & Gibson, Dallas, TX.

JUDGES: Before KING, Chief Judge, and HIGGINBOTHAM and BARKSDALE, Circuit Judges.

OPINIONBY: RHESA H. BARKSDALE

OPINION:

[*410] RHESA H. BARKSDALE, Circuit Judge:

Primarily at issue are two points: (1) whether the Government's use of a summary witness on rebuttal constitutes reversible plain error; and (2) whether the district court clearly erred in enhancing defendant's sentence, pursuant to U.S.S.G. § 3B1.1(a), for his being "an organizer or leader of a criminal activity that ... was otherwise extensive". Although the conviction and sentence are AFFIRMED, we are concerned about application of these two points in cases of this type.

I.

Lea Scott Fullwood was a farmer in Nolan County, Texas, who participated in farm assistance programs administered by the federal Farm Service Agency (FSA). To receive FSA crop disaster payments, he had to certify to the Nolan County FSA office each of the crops planted on his farms. He was also entitled to purchase, through independent crop insurance agents, multiple peril crop insurance reinsured by the Government. (The private insurers are reimbursed by the Federal [*411] Crop Insurance [**2] Corporation (FCIC) (managed by the Risk Management Agency (RMA)) for certain claims they pay to insured producers based on crop losses, as well as for portions of the producers' premiums, which are subsidized by the Government.)

In mid-1999, Fullwood was introduced to Darren Jeffrey, an insurance adjuster. Jeffrey offered to submit fraudulent appraisals for claims; in return, Jeffrey would receive kickbacks of five percent of the payments. Fullwood agreed and subsequently introduced Jeffrey to Fullwood's father and father-in-law (both farmers), advising them of the fraudulent scheme.

During 1999, Fullwood farmed cotton and grain sorghum. However, he did not plant all of the acreage he certified to the FSA county office or to Hargrove Insurance Company, through which he had obtained multiple peril crop insurance. (Hargrove Insurance Company is a broker for Fireman's Fund Insurance, which issued the insurance.) For example, although Fullwood did not plant grain sorghum on two of his father-in-law's farms, he certified having done so. (To carry out this scheme, Fullwood's father-in-law executed a "cash lease agreement" between him and Fullwood, which Fullwood submitted to the FSA to [**3] establish the requisite interest in those farms.)

Fullwood then made fraudulent claims based on acreage he did not plant, both for crop disaster payments from the FSA and on the federally-reinsured Fireman's Fund policies. Fullwood claimed hail and excess precipitation damaged his cotton crop. In connection with these claims, he

executed various cotton appraisals and production worksheets. (Jeffrey indicated that he had inspected certain fields and had taken samples, and that little cotton had remained. No such inspections were made.) At Fullwood's request, Jeffrey also performed bogus appraisals on Fullwood's grain sorghum crop; Fullwood submitted similar fraudulent claims asserting that drought had damaged that crop.

In executing the scheme, Fullwood made extensive use of the United States mail and private interstate carriers. Ultimately, he requested more than $ 310,000 and received approximately $ 235,000. (Certain amounts were withheld because Fullwood was under investigation.)

Fullwood was convicted of: conspiracy to commit mail fraud, violate the False Claims Act, and make false statements to the Government, in violation of 18 U.S.C. §§ 371 & 2; making [**4] false statements to agencies of the United States, in violation of 18 U.S.C. § 287; mail fraud, in violation of 18 U.S.C. § 1341; and, making false statements in a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. § 1001. He was sentenced to 41-months' imprisonment and ordered to pay restitution of $ 235,000.

II.

At issue is whether the district court: (1) abused its discretion in admitting expert testimony; (2) committed reversible plain error by allowing the Government to use a summary witness on rebuttal; and (3) committed clear error by imposing a four-level sentence enhancement for Fullwood's having been a leader or organizer of the criminal activity.

A.

Pre-trial, Fullwood moved to exclude Dr. Brown's expert testimony, which was based on satellite imagery. After a hearing during the trial, just prior to Dr. Brown's testifying, the district court overruled Fullwood's objections.

Dr. Brown testified that, based upon satellite imagery, he could determine if [*412] fields had been vegetated, were without crops, or had been recently tilled or cultivated. His testimony was [**5] offered to show that satellite images of farms where Fullwood claimed to have planted certain crops revealed that the crops were not planted on the dates claimed by Fullwood. Among other things, Dr. Brown testified that the farms allegedly leased from Fullwood's father-in-law had not been plowed and had remnants of a crop consistent with hay grazer, not grain sorghum (contrary to the certification).

The admission of expert testimony is reviewed for abuse of discretion. E.g., *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 371 (5th Cir. 2000). The district court's role in determining admissibility of scientific testimony under FED. R. EVID. 702 is that of gatekeeper. E.g., Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). Rule 702 sets the admission standard:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony [**6] is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The proponent has the burden of establishing, by a preponderance of the evidence, that the pertinent admissibility requirements are met. See FED. R. EVID. 104(a), cmt.

Even though Fullwood concedes "that the Government's expert witness was highly credentialed", he contends there was too great a gap between the premise of satellite imagery, as it relates to crop cultivation, and the conclusion reached by Dr. Brown that certain crops were not planted. He also takes issue with: whether the testimony was

within the area of expertise established; and the rate of error (five percent) as applied to the testimony.

Fullwood's contentions are conclusory and without merit. In response to Fullwood's motion to exclude, the Government submitted a detailed response that provided a list of 16 articles, all published in peer-reviewed scientific journals, which demonstrated the general acceptance in the scientific community of the techniques used by Dr. Brown. The Government also pointed [**7] out that the Eighth Circuit upheld the admission of Dr. Brown's testimony in a similar case. See United States v. Larry Reed & Sons P'ship, 280 F.3d 1212, 1215 (8th Cir. 2002).

At the hearing on the motion, Dr. Brown's curriculum vitae was admitted into evidence. As Fullwood acknowledges, Dr. Brown's credentials are substantial (including a Ph.D. in horticulture and numerous publications). Also, at that hearing, Dr. Brown testified: the remote sensing technology he employs "has been around for several decades"; his techniques are used "every day" by science, industry, and government; and there have been "hundreds of investigations that have been conducted, probably thousands", validating his methodology.

The Government satisfied its burden. In short, there was no abuse of discretion.

B.

Fullwood next challenges the Government's use of a summary witness on rebuttal. For its last witness in its case-in-chief, the Government called the Special Agent in charge of the investigation for the [*413] USDA. That Special Agent testified both about conversations he had with Fullwood and Fullwood's father-in-law (Fullwood's co-defendant) and as a summary witness. [**8]

On rebuttal, the Government re-called that Special Agent as its last witness. The Special Agent was allowed to recap a significant portion of the testimony already introduced by the Government. Although Fullwood's father-in-law objected to this testimony as being outside the scope

of rebuttal, Fullwood did not likewise object. (His father-in-law's objection was overruled.)

The district court instructed the jury that the testimony of a summary witness is not "in and of [itself] evidence or proof of any facts" but is used to explain and should be disregarded "to the extent ... [it is] not [an] accurate summary". Along this line, Fullwood does not contend that the testimony was in any way inaccurate.

Because Fullwood did not object, we review only for plain error. See FED. R. CRIM. P. 52(b); e.g., United States v. Garcia-Flores, 246 F.3d 451, 457 (5th Cir. 2001). This quite restrictive standard requires Fullwood to demonstrate a "clear" or "obvious" error that affected his substantial rights. Id. Even then, we have discretion to correct the error and will generally not do so unless it "seriously affects the fairness, integrity, or [**9] public reputation of judicial proceedings". E.g., United States v. Calverley, 37 F.3d 160, 164 (5th Cir. 1994) (en banc) (quotation omitted), cert. denied, 513 U.S. 1196, 131 L. Ed. 2d 145, 115 S. Ct. 1266 (1995).

The Government asserts that FED. R. EVID. 1006 allows the use of summary witnesses. It provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court.

As the Government concedes, this rule does not specifically address summary witnesses or summarization of trial testimony. This omission is significant -- "plainly, the rule does not contemplate summarization of live testimony presented in court". United States v. Castillo, 77 F.3d 1480, 1499 n.36 (5th Cir.), cert. denied, 519 U.S. 868, 136 L. Ed. 2d 120, 117 S. Ct. 180 (1996).

For complex cases, we have allowed [**10] summary witnesses in a limited capacity. See United States v.

Bishop, 264 F.3d 535, 547 (5th Cir. 2001), cert. denied, 535 U.S. 1016, 152 L. Ed. 2d 620, 122 S. Ct. 1605 (2002) (allowing IRS agent to testify as summary witness where summary had foundation in evidence already admitted and was accompanied by limiting instruction); United States v. Moore, 997 F.2d 55 (5th Cir. 1993) (permitting IRS agent to selectively summarize where facts fell within his expertise).

On the other hand, there are limits that may well have been exceeded here, because, as the final rebuttal witness, the Special Agent was allowed, without justification, to simply recap substantial portions of the Government's case-in-chief. The use of summary evidence serves an important purpose, but that purpose is not simply to allow the Government to repeat its entire case-in-chief shortly before jury deliberations. Moreover, there are obvious potential dangers associated with its use. See, e.g., *Castillo*, 77 F.3d at 1500 ("without good reason or real need, [summary witness testimony] unfairly allowed one prosecution witness merely [**11] to repeat or [*414] paraphrase the in-court testimony of another"); *United States v. Johnson*, 54 F.3d 1150 (4th Cir.) (summary witness testimony inappropriate in normal case given inherent dangers, including confusion), cert. denied, 516 U.S. 903 (1995); *United States v. Baker*, 10 F.3d 1374, 1412 (9th Cir. 1993) (summary witness should only be allowed in "exceptional cases" because the credibility of summary witness may be substituted for the credibility of the evidence summarized), *cert. denied*, 513 U.S. 934, 130 L. Ed. 2d 289, 115 S. Ct. 330 (1994).

In the light of this case having some arguable complexity, our precedent allowing such testimony in complex cases, the limiting instruction given, and the unchallenged accuracy of the testimony, the summary testimony did not constitute reversible plain error. Cf. *Castillo*, 77 F.3d at 1500 (no reversible error where summary witness "did not misstate or put an unfair 'spin' on the testimony he repeated or paraphrased, and it was uncontradicted"); *United States v. Okoronkwo*, 46 F.3d 426,

435 (5th Cir.)(use of summary [**12] witness not reversible error where merely cumulative of substantive evidence), cert. denied, 516 U.S. 833, 133 L. Ed. 2d 60, 116 S. Ct. 107 (1995); *United States v. Winn*, 948 F.2d 145, 157-58 (5th Cir. 1991) (use of summary chart and testimony not reversible error where prejudice neutralized by instruction), *cert. denied*, 503 U.S. 976, 118 L. Ed. 2d 313, 112 S. Ct. 1599 (1992). Even assuming the admission of the summary testimony was clear or obvious error, the error did not affect Fullwood's substantial rights.

Nevertheless, in the light of the above-described dangers and the seemingly increased use of such witnesses by the Government, we strongly caution, once again, against use of summary witnesses in this fashion, especially in a non-complex case. While such witnesses may be appropriate for summarizing voluminous records, as contemplated by Rule 1006, rebuttal testimony by an advocate summarizing and organizing the case for the jury constitutes a very different phenomenon, not justified by the Federal Rules of Evidence or our precedent. For example, summary witnesses are not to be used as a substitute for, or a supplement [**13] to, closing argument.

C.

Finally, Fullwood challenges the four-point enhancement he received, pursuant to U.S.S.G. § 3B1.1, for being an organizer or leader of the criminal activity. The presentence investigation report (PSR) recommended the enhancement on the basis that Fullwood was an organizer or manager in a criminal activity that, consistent with the language of § 3B1.1, was otherwise extensive. Over Fullwood's objection, the district court imposed the enhancement, finding Fullwood "did manage or supervise others in regard to this commission of this offense, particularly in regard to his father-in-law[,] his father[,] and also as to the adjustor...."

The pertinent portion of § 3B1.1 states:

Based on the Defendant's role in the offense, increase the offense levels as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(Emphasis added.)

In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three [**14] participants but used the unknowing services [*415] of many outsiders could be considered extensive.

U.S.S.G. § 3B1.1, cmt. n.3 (emphasis added). Fullwood claims the enhancement was improper because his criminal activity did not involve the requisite five participants and was not "otherwise extensive".

The application of § 3B1.1 is a factual finding reviewed only for clear error. E.g., *United States v. Cabrera*, 288 F.3d 163, 173 (5th Cir. 2002). "A factual finding is not clearly erroneous as long as it is plausible in the light of the record as a whole." *United States v. Powers*, 168 F.3d 741, 752 (5th Cir.) (internal quotation and citation omitted), *cert. denied*, 528 U.S. 945, 145 L. Ed. 2d 282, 120 S. Ct. 360 (1999).

The Government does not contend the offense involved five or more persons. Instead, as recommended by the PSR, it maintains the enhancement is justified because Fullwood was the leader or organizer of criminal activity that "was otherwise extensive". Along this line, the Government points to the involvement of Jeffrey (the appraiser), Fullwood's father and father-in-law, and the following unwitting [**15] participants: USDA; RMA; FCIC; FSA; FSA, Nolan County Office; Rayford Hargrove (insurance agent); Hargrove Insurance Company; Fireman's Fund Insurance Company; the United States Postal Service; and private interstate carriers.

In the light of the use of these unknowing participants, the "otherwise extensive" application was not clearly erroneous. *United States v. Davis*, 226 F.3d 346, 360 (5th Cir. 2000), cert. denied, 531 U.S. 1181, 148 L. Ed. 2d 1021, 121 S. Ct. 1161 (2001), held that applying the § 3B1.1(a) enhancement was not clearly erroneous because of the involvement of unwitting accomplices where the defendant operated "an advance-fee scheme in which he would agree to obtain funding for clients, but would never do so". Id. at 348-49. There, the scheme involved employees of a financial company, loan brokers, lawyers, and those providing "due diligence" reports. Id. See also *United States v. Sidhu*, 130 F.3d 644 (5th Cir. 1997) (§ 3B1.1 applied to physician involved in healthcare fraud where patients and insurance company's employees were unknowing participants); *United States v. Allibhai*, 939 F.2d 244, 253 (5th Cir. 1991), [**16] *cert. denied*, 502 U.S. 1072, 117 L. Ed. 2d 133, 112 S. Ct. 967 (1992) (§ 3B1.1 applied to scheme involving only four participants that used services of outsiders such as bank employees). The use of unsuspecting participants was similarly extensive here. Application of the enhancement on that basis was not clearly erroneous.

Fullwood also maintains, quite conclusionally, that his role was not one of leader or organizer. The factors to be considered are: (1) exercise of decision-making authority; (2) nature of participation in the commission of the offense; (3) recruitment of accomplices; (4) claimed right to a larger share of the fruits of the crime; (5) degree of participation in planning or organizing; (6) nature and scope of the illegal activity; and (7) degree of control or authority exercised over others. U.S.S.G. § 3B1.1, cmt. n.4.

Fullwood: chose which false claims to submit; prepared, signed, and submitted those claims; introduced Jeffrey to his father and father-in-law, presumably to bring them in on the scheme; took 95 percent of the profits (all but the five percent kickback); and, as stated, utilized the services

of countless outsiders. Finding him [**17] to be a leader or organizer was not clearly erroneous.

We caution, however, that this case arguably comes close to the lower limits, for § 3B1.1 purposes, for what constitutes an organizer or leader of criminal activity that [*416] was otherwise extensive. The enhancement is designed to assign greater punishment to those engaged in leading criminal enterprises, in part because of concerns about relative responsibility. See U.S.S.G § 3B1.1 cmt. It is to be imposed against defendants who tend to profit more from criminal enterprises, pose a greater danger to the public, and are more likely to recidivate. Id. Obviously, it is not a plea bargaining tool; likewise, it is not to be applied automatically.

III.

For the foregoing reasons, Fullwood's conviction and sentence are

AFFIRMED.

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APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS ENTERED 7-12-02

ENTERED JULY 12, 2002
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION
JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
UNITED STATES OF AMERICA,

v.

LEA SCOTT FULLWOOD

Case Number: 1:01-CR-0080-01-C
Assistant United States Attorney: William B. Mateja
Defendant's Attorney: Floyd Holder, Jr.
Court Reporter: Michelle Daniel

The defendant Lea Scott Fullwood has been found not guilty on counts 2-9, 12-16, 19-25, 28-34, 37-43, and 46 and is discharged as to such counts.
The defendant was found guilty on counts 1, 10, 18, 18, 26, 27, 35, 36, 44, 45, and 47 through 57 by a jury verdict on 04/11/2002 after a plea of not guilty. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:
Title & Section: 18 USC § 371 & 18 USC § 2
Nature of Offense: Conspiracy to Commit Mail Fraud, Submit False Claims, Make False Statements and Aiding and Abetting
Date of Offense: May 19999 to January 2000
Count Number(s): 1
Title & Section: 18 USC § 287
Nature of Offense: False Claims
Date of Offense: June 1999 to August 1999
Count Number(s): 10
Title & Section: 18 USC § 287
Nature of Offense: False Claims
Date of Offense: June 1999 to August 1999
Count Number(s): 11
Title & Section: 18 USC § 287

Nature of Offense: False Claims
Date of Offense: June 1999 to January 2000
Count Number(s): 17
Title & Section: 18 USC § 287
Nature of Offense: False Claims
Date of Offense: June 1999 to January 2000
Count Number(s): 18
Title & Section: 18 USC § 1341
Nature of Offense: Mail Fraud
Date of Offense: June 1999 to August 1999
Count Number(s): 26
Title & Section: 18 USC § 1341
Nature of Offense: Mail Fraud
Date of Offense: June 1999 to August 1999
Count Number(s): 27
Title & Section: 18 USC § 1001
Nature of Offense: False Statements
Date of Offense: June 1999 to August 1999
Count Number(s): 35
Title & Section: 18 USC § 1001
Nature of Offense: False Statements
Date of Offense: June 1999 to August 1999
Count Number(s): 36
Title & Section: 18 USC § 1001
Nature of Offense: False Statements
Date of Offense: June 1999 to January 2000
Count Number(s): 44
Title & Section: 18 USC § 1001
Nature of Offense: False Statements
Date of Offense: June 1999 to January 2000
Count Number(s): 45
Title & Section: 18 USC § 287
Nature of Offense: False Claims
Date of Offense: July 1999 to September 1999
Count Number(s): 47
Title & Section: 18 USC § 287
Nature of Offense: False Claims

Date of Offense: July 1999 to September 1999
Count Number(s): 48
Title & Section: 18 USC § 287
Nature of Offense: False Claims
Date of Offense: July 1999 to January 2000
Count Number(s): 49
Title & Section: 18 USC § 287
Nature of Offense: False Claims
Date of Offense: July 1999 to January 2000
Count Number(s): 50
Title & Section: 18 USC § 1341
Nature of Offense: Mail Fraud
Date of Offense: July 1999 to September 1999
Count Number(s): 51
Title & Section: 18 USC § 1341
Nature of Offense: Mail Fraud
Date of Offense: July 1999 to September 1999
Count Number(s): 52
Title & Section: 18 USC § 1001
Nature of Offense: False Statements
Date of Offense: July 1999 to September 1999
Count Number(s): 53
Title & Section: 18 USC § 1001
Nature of Offense: False Statements
Date of Offense: July 1999 to September 1999
Count Number(s): 54
Title & Section: 18 USC § 1001
Nature of Offense: False Statements
Date of Offense: July 1999 to January 2000
Count Number(s): 55
Title & Section: 18 USC § 1001
Nature of Offense: False Statements
Date of Offense: July 1999 to January 2000
Count Number(s): 56
Title & Section: 18 USC § 1001
Nature of Offense: False Statements
Date of Offense: January 31, 2000

Count Number(s): 57

As pronounced on 07/12/2002, the defendant is sentenced as provided in pages 1 through 5 of this Judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $2,200.00, for counts 1, 10, 11, 17, 18, 26, 27, 35, 36, 44, 45, 47, and 48 through 57, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendants shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 12th day of July, 2002.

Defendant's Social Security No.: XXX-XX-XXXX
Defendant's Date of Birth: 05/20/1958
Defendant's Address: 518 County Road 151, Roscoe, TX 79545
Defendant's USM No.: 27965-177
IN CUSTODY
Signature of Judicial Officer
/SS/
Name and Title of Judicial Officer:
SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

DEFENDANT: LEA SCOTT FULLWOOD
CASE NUMBER: 1:01-CR-0080-01-C

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 41 months as to Counts 1, 10, 11, 17, 18, 26, 27, 35, 36, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, and 57, with the terms of imprisonment to be served concurrently as to each count.

It is ordered that the defendant report directly to the designated institution, at his/her own expense, on August 2, 2002, no later than 2:00 p.m.

The Court recommends that the defendant be placed at FCI Big Spring, Texas.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this Judgment.

_____

United States Marshal

By:

_____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years as to each of Counts 1, 10, 11, 17, 18, 26, 27, 35, 36, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, and 57, with the terms of supervised release be served concurrently on each count.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[x] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.
[x] The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shah report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons.
6) The defendant shall notify the probation officer ten days prior to any change m residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall nor purchase, possess, use distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.
11) The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a taw enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. Pursuant to the Mandatory Victim Restitution Act of 1996, the defendant shall make restitution in the amount of $234,656.00, payable to the U.S. District Clerk, P.O. Box 1218, Abilene, TX 79604 for disbursement to:

USDA, RMA FOSD STOP 0814
Financial Operations Branch
6501 Beacon Drive
Kansas City, MO 64133-4676
No Account Number

The defendant shall make an immediate payment of $10,000.00. Thereafter, the balance shall be payable through monthly installments of at least $500.00 per month. Payment shall begin while the defendant is incarcerated. Further, pursuant to 18 USC § 3612(f)(3), interest on the restitution is waived. Restitution shall be paid jointly and severally with Darren Randal Jeffrey, Case No. 1:01-CR-0030-01-C, Northern District of Texas, Abilene Division.

2. The defendant shall provide to the U.S. Probation Officer complete access to all business and personal financial information.

3. The defendant shall refrain from incurring new credit charges or opening additional lines of credit without approval of the U.S. Probation Officer.

4. The defendant will voluntarily exclude himself from any participation in the U.S. Department of Agriculture programs. This exclusion is effective from the date of the judgment until the time of sentence imposed by the Court, including any term of supervised release, has been completed.

RESTITUTION

The defendant shall make restitution (including community restitution) to the following persons in the following amounts.

Name of Payee $234,656.00
USDA, RMA FOSD STOP 0814
Financial Operations Branch
6501 Beacon Drive
Kansas City, MO 64133-4676
No Account Number

The defendant shall make an immediate payment of $10,000.00. Thereafter, the balance shall be payable through monthly installments of at least $500.00 per month, payable to the U.S: District Clerk, P.O. Box 1218, Abilene, TX 79604.

Payment shall begin while the defendant is incarcerated. Further, pursuant to 18 USC § 3612(f)(3), interest on the restitution is waived. Restitution shall be paid jointly and severally with Darren Randal Jeffrey, Case No. 1:01-CR-0030-0 l-C, Northern District of Texas, Abilene Division.

APPENDIX C

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

U.S.S.G. § 3B1.1 provides:

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Commentary

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such

as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of § 3B1.1(c). *Id.* (As amended effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 414); November 1, 1993 (see Appendix C, amendment 500)

Federal Rule of Evidence 1006 provides:

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court. *Id.* (As amended effective Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1946.)